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Supreme Court of the United States

..... TERM, 19.....

No. 561

ANTHONY ADAMO,

Petitioner,

vs.

LLOYD W. McCORKLE, Acting Principal Keeper of the New Jersey State Prison at Trenton,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY, AND BRIEF IN SUPPORT THEREOF.

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LLOYD W. MCCORKLE, Acting Principal Keeper of the New Jersey State Prison at Trenton,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Anthony Adamo, of the Borough of Lodi, Bergen County, and State of New Jersey, prays that a writ of certiorari issue to review the judgment of the New Jersey Supreme Court entered upon November 23, 1953, reversing the judgment of the Appellate Division of the Superior Court of New Jersey entered upon July 21, 1953.

Opinions Below.

The opinion of the New Jersey Supreme Court is reported in 13 N. J. 561, 100 Atl. 2d 674 (R. 32). The opinion of the Appellate Division of the Superior Court of New Jersey is reported in 26 N. J. Super. 562, 98 Atl. 2d 597 (R. 15).

Basis of Jurisdiction.

1. The judgment of the New Jersey Supreme Court was entered on November 23, 1953 (R. 39). The jurisdiction of this Court is invoked under the due process clause of the Fourteenth Amendment and also under Section 1257(3) of Title 28 of the United States Code, setting forth the final judgments by the highest court of a State which may be reviewed by this Honorable Court.

2. The Supreme Court of the State of New Jersey is the highest court of the State.

3. The judgment of which review is sought is a final judgment of the Supreme Court of New Jersey (R. 39).

4. The judgment herein sought to be reviewed was filed on November 23, 1953 (R. 39).

5. The Federal question of substance which has been decided by the State Court is one concerning due process of law and double jeopardy, namely, that a trial court, two and one-half years after sentencing a defendant to be put on probation for five years and fined $500.00, no mention whatsoever being made of the suspension of any prison sentence, has the power upon "violation of probation" to super-add a prison term of not less than two, nor more than three years in State Prison, to the original sentence.

The decision of the Supreme Court of New Jersey is in conflict with the decisions of this Honorable Court in the following cases:

Ex Parte Lange, 18 Wall. 163, 21 L. Ed. 872 (1873);

Roberts v. *United States,* 320 U. S. 264, 64 S. Ct. 113, 88 L. Ed. 41 (1943);
United States v. *Benz,* 282 U. S. 304, 51 S. Ct. 113, 75 L. Ed. 354 (1931);
United States v. *Murray,* 275 U. S. 347, 48 S. Ct. 146, 72 L. Ed. 309 (1928).

6. The federal question was timely raised and considered. The Supreme Court of New Jersey held that the prison sentence superimposed two and one-half years after the original sentence, was not contrary to due process of law (R. 38).

Statutes Involved.

The statutes involved are set out in the Appendix, *infra,* pages 19-21.

Questions Presented.

1. Is the action of a trial court in sentencing a defendant to be put on probation for five years, and in addition fined $500.00, a *sentence* or a *suspension of sentence?*

2. May a trial court, two and one-half years after sentencing a defendant to be put on probation for five years and fined $500.00, no mention whatsoever being made of the suspension of any prison sentence, super-add, upon "violation of probation," a prison term of not less than two, nor more than three years in State Prison, to the original sentence?

3. Is such super-added prison sentence double jeopardy and therefore without due process of law in contravention of the 14th Amendment?

Statement of Matter Involved.

The facts are not in dispute and we therefore adopt the following statement from the opinion of the New Jersey Supreme Court which sets up the controlling facts concisely:

> "The Appellate Division, 26 N. J. Super. 562, 98 A. 2d 597, by a divided vote, reversed the Law Division's order discharging the writ of habeas corpus which the plaintiff Anthony Adamo had obtained.
>
> On January 23 and 24, 1950, Anthony Adamo was tried on two indictments for assault. The jury found him guilty as charged in both indictments and on February 8, 1950, the State moved for sentence. At that time the trial court made the following pronouncement:
>
> > 'It is the judgment of this court that this defendant be put on probation for a period of five years. He is to report once a week to the Probation Officer of this County, the time and place to be fixed by the Probation Office. He is to obey all the rules of the Probation Office which generally speaking means that he is to observe the law of this State, of the United States, and of any State where he may be permitted to go. He is not to leave the State of New Jersey without the permission of either the Probation Officer or the Judge of the Court. In addition to this, he will be fined $500.00. This fine may be paid in installments.'
>
> On May 16, 1952 Adamo was charged with violation of his probation. Prior to that date the $500 fine had been paid. Hearings on the charge of violation of probation were held and on August 13, 1952 there was a finding of guilty, the probation was revoked and Adamo was remanded to the Bergen County jail to await sentence. On August 20, 1952, he was sentenced to concurrent terms of not less than two nor more than three years in State Prison.

> Thereafter Adamo obtained a writ of habeas corpus, contending that the fine was the original sentence imposed upon him, that payment executed the sentence, and that the court lacked power to impose the later prison sentence. The writ was discharged in the Law Division. On his appeal to the Appellate Division a majority of the court held that since the judgment of probation was not preceded by an express declaration that imposition of sentence was being suspended, it was void, thus leaving the fine as the valid and fully executed sentence. Judge Francis, dissenting, found that the judgment of probation for five years necessarily meant that the imposition of sentence was being suspended and there was no need for any further formal expression to that effect; he considered that the fine was simply one of the several conditions of probation and that its payment in nowise altered or terminated Adamo's clear obligation to comply with all other terms of the probation."

The opinion of the New Jersey Supreme Court stated that the court was in full agreement with the position taken by Judge Francis. The judgment entered in the Appellate Division of the Superior Court of New Jersey was then reversed and the Law Division's Order discharging the writ of habeas corpus was reinstated.

The reason for the opinion of the Supreme Court of New Jersey appears clearly in its opinion. It stated, first, that the placing of the defendant upon probation for a period of five years and ordering the payment of a fine of $500.00 was not a sentence, but a suspension of sentence. The subsequent sentence, imposed upon "violation of probation," of not less than two nor more than three years in State Prison was held to be the only sentence imposed and therefore not contrary to due process of law.

Reasons for Granting the Writ.

The Supreme Court of New Jersey has decided an important question arising under the Fourteenth Amendment to the Constitution of the United States. It holds that the judgment of a trial court that a defendant, upon conviction, be put on probation for a period of five years and fined $500.00, necessarily meant that the imposition of sentence was being suspended, and that although the fine of $500.00 had been paid, the trial court could, two and one-half years later, upon finding the defendant guilty of "violation of probation," sentence the defendant to a term of not less than two, nor more than three years in State Prison.

The Supreme Court of New Jersey held that "In the instant matter the defendant received, in full measure, not only the protection of our firmly embedded concepts of due process and fair play, but also the benefits of the current penological approaches."

The decision of the Supreme Court of New Jersey manifestly sanctions the imposition of two sentences upon a defendant for the same offense, constitutes double jeopardy and violates due process of law within the intendment of the Fourteenth Amendment.

As the Appellate Division of the Superior Court of New Jersey stated in its opinion, reported in 26 N. J. Super. 562, 98 A. 2d 597, reversed by the New Jersey Supreme Court:

> "Assuming the right of the sentencing court here to impose a fine and to place the defendant on probation as to imprisonment, the fact is that not a word was uttered by it with respect to imprisonment or the suspension of its imposition or execution or about placing the plaintiff on probation as to it.
>
> "An offender standing before the court after conviction should be apprised exactly of what sentence

is imposed upon him, what part of it, if any, has been suspended, and if he be placed on probation what conditions he must comply with. It would not be right, proper or fair to hold that a suspension of sentence as to imprisonment is implied or inherent in the placing of an offender upon probation where a fine is simultaneously imposed upon him.

"Since there was no suspension of the imposition or execution of a prison sentence here, and as there was a fine imposed which was fully paid prior to the proceeding in which the plaintiff was tried for probation violation, the sentencing court had no power to sentence the plaintiff to state prison as a probation violator and such sentence is void. The sentence imposed originally had been executed." Cf. *Roberts* v. *United States,* 320 U. S. 264 (1943).

The Supreme Court of New Jersey has erroneously decided a federal question of substance in a way probably not in accord with applicable decisions of this court, and with the decisions hereinbefore set forth in paragraph 5 under Basis of Jurisdiction.

The Fifth Amendment specifically provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. We believe that the Fourteenth Amendment affords the accused similar protection against State action. This Honorable court has on a number of occasions reviewed State judgments to ascertain whether the accused had been twice put in jeopardy of life or limb, but in all of those cases the court decided that the accused were not put in jeopardy for the second time for the same offense, and therefore it was not necessary for this Honorable court to go further and decide whether such right is protected by the Fourteenth Amendment. We believe that the case *sub judice* squarely presents this issue and that

such a ruling should not be allowed to stand in the absence of a review by this court of the judgment below.

Your petitioner respectfully submits that the writ of certiorari should issue to the end that this court may review the final judgment and decision of the Supreme Court of New Jersey and determine whether that Court has deprived petitioner of rights guaranteed by the Fourteenth Amendment to the Federal Constitution.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

I.

Opinions of the courts below.

The opinion of the New Jersey Supreme Court is reported in 13 N. J. 561, 100 Atl. 2d 674 (R. 32). The opinion of the Appellate Division of the Superior Court of New Jersey is reported in 26 N. J. Super. 562, 98 Atl. 2d 597 (R. 15).

II.

Jurisdiction.

Jurisdiction is fully covered in the foregoing petition and the statement therein made is here adopted by reference.

III.

Statement of the case.

The petitioner herewith adopts the statement of matters involved set forth in the opinion of the New Jersey Supreme Court and hereinbefore quoted as the trial facts in this case. There is no dispute as to the occurrences but only as to the conclusions of law resulting therefrom.

IV.

Assignments of error.

The New Jersey Supreme Court erred as follows:

(1) It held that the action of a trial court in sentencing a defendant to be put on probation for five (5) years, and in addition, fined $500.00, was not a sentence but a suspension of the imposition of a sentence.

(2) It held that the judgment of a trial court that a defendant, upon conviction, be put on probation for a period of five (5) years and fined $500.00 necessarily meant that the imposition of sentence was being suspended, and that although the fine of $500.00 had been paid, the trial court could, two and one half years later, upon finding the defendant guilty of "violation of probation" sentence him to a term of not less than two nor more than three years in State Prison.

(3) It held that "in the instant matter, the defendant received, in full measure, not only the protection of our firmly embedded concepts of due process and fair play but also the benefits of the current penological approaches."

(4) The action of the trial court in sentencing the defendant, upon finding him guilty of "violation of probation" to a term of not less than two nor more than three years in State Prison, subsequent to having sentenced him to be put on probation for a period of five years and fined $500.00, which fine had been paid, put the defendant twice in jeopardy of life or limb, and was contrary to the due process of law required by the Fourteenth Amendment.

V.

Summary of argument.

POINT I. The language of the trial court of February 8, 1950 was a sentence and exhausted the power of the court to further punish the accused after the judgment had gone into operation.

POINT II. The action of the trial court in imposing a prison sentence two and one-half years after it had imposed a fine, for the same offense, constitutes double jeopardy and violates due process of law within the intendment of the Fourteenth Amendment.

ARGUMENT.

I.

The language of the trial court of February 8, 1950 was a sentence and exhausted the power of the court to further punish the accused after the judgment had gone into operation.

There can be no question that the action of the court on February 8, 1950 was the imposition of a sentence. It declared to the accused the legal consequences of the guilt of which he had been convicted.

A sentence denotes the action of the court in which the plea is made or verdict rendered, declaring the consequences to the convicted of the facts ascertained.

> *Stewart* v. *Stewart,* 93 N. J. Eq. 1, 114 A. 851 (Chan. Ct. 1921).

In the technical sense, "sentence" ordinarily is synonymous with "judgment" and denotes the action of a court

of criminal jurisdiction formally declaring to the accused the legal consequences of the guilt which he has confessed or of which he has been convicted.

79 C. J. S. 1042.

The New Jersey Supreme Court decided that the manner in which the court rendered its judgment discloses beyond peradventure that the fine was simply one of the several conditions of the probation. We respectfully submit that this is error, and that, on the contrary, the fine was not a condition of probation but manifestly the punishment or sentence for the offense; it could have been the complete sentence and it might have been payable forthwith, but the trial court decided to place the defendant on probation to liquidate it in instalments. The language used by the sentencing Judge (R. 13) and a reading of the Probation Statute R. S. 2:199-2, *infra* 19 clearly indicate that the $500.00 mentioned by the court was a fine and punishment under R. S. 2:103-6, *infra* 21. The Probation Statute R. S. 2:199-4, *infra* 20 is not concerned with the imposition of a fine, but simply with the liquidation of a fine in one or several sums, as a condition of probation. This is corroborated by the inquiry made by the trial court of counsel (R. 13) to inform the court in what instalments the defendant could pay the fine. Any other construction would permit the court, as a condition of probation, to impose a greater fine than that permitted by the statute as punishment for the offense itself.

It is to be noted that the original judgment of the trial court of February 8, 1950 (R. 13) did not impose a prison sentence nor suspend the execution of a prison sentence. It placed the defendant on probation for a period of five years and fined him $500.00 and costs of $15.00, which were paid. Thereafter, the power of the court to

punish the offender was exhausted and the court had no power or jurisdiction to super-add the sentence of imprisonment of August 20, 1952.

The action of the trial court in placing the accused on probation was not a suspension of sentence. The court did not stop after it stated that it had placed the defendant on probation. Actually, the court proceeded to impose a sentence of a fine of $500.00. Therefore, the court did not suspend sentence but proceeded to impose it by the imposition of the fine. The sentence was fully executed by the payment of the fine, thereby exhausting the power of the court to further punish the offender.

Whole or partial payment of a fine pursuant to a valid sentence is tantamount to commitment of the defendant, within the meaning of the rule that a trial court cannot amend or modify a valid sentence in a criminal case after the defendant has been committed.

Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872 (1873);

United States v. *Murray,* 275 U. S. 347, 48 S. Ct. 146, 72 L. Ed. 309 (1928);

Frankel v. *United States,* 131 F. 2d 756, (C. C. A. 6th, Mich. 1942);

Santis v. *Esola,* 50 F. 2d 516, (C. C. A. 9th 1931);

Yavorski v. *United States,* 1 F. 2d 169 (C. C. A. 3d, 1924).

The principle is well-established that a court has no power to impose two sentences for a single offense. It may suspend the judgment of a criminal in toto, until another term, but cannot inflict two sentences for a single conviction by imposing a fine and at a later term super-adding imprisonment.

Roberts v. *United States,* 320 U. S. 264, 64 S. Ct. 113 (1943);
Commonwealth v. *Hottle,* 139 Pa. Super. 128, 11 Atl. 2d 524, Pa. Super. Ct. 1940.

II.

The action of the Trial Court in imposing a prison sentence two and one-half years after it had imposed a fine, for the same offense, constitutes double jeopardy and violates due process of law within the intendment of the Fourteenth Amendment.

The Fifth Amendment specifically provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. Although the Fourteenth Amendment does not use the words "twice put in jeopardy of life or limb," it does prohibit any state from depriving any person of life, liberty or property, without due process of law.

This honorable Court has, on numerous occasions, reviewed state judgments wherein the accused charged that they had been twice put in jeopardy of life or limb for the same offense. However, in all of those cases this Court found that the petitioner had not been put in double jeopardy and therefore it was unnecessary to decide whether such right is protected by the Fourteenth Amendment.

We believe that the instant case clearly manifests that two separate and distinct sentences, for the same offense, were imposed upon the defendant. Certainly, this must be considered putting the petitioner twice in jeopardy of life or limb and contrary to due process of law within the intendment of the Fourteenth Amendment.

The want of due process of law is a legal or philosophical concept as to the extent to which a state, in the exercise of

its sovereign power, should be permitted to deprive individuals within its jurisdiction of their lives, liberty or property.

Douglas v. *City of Jeannette,* Pa. 130 F. 2d 652, 657 (C. C. A. Pa.).

"As a general rule, where accused has executed or entered on the execution of a valid sentence, the court cannot, even during the term at which the sentence was rendered, set it aside and render a new sentence; nor can any amendment to the judgment be allowed where it would require a new sentence to be pronounced. It would seem that this rule applies only to the substance of the sentence, that is, to that part of it which prescribes the kind and amount of punishment, and it does not prohibit the alteration of those parts of the sentence which merely direct when its execution shall commence or in what prison it shall be accomplished. Moreover, it is the rule in at least some jurisdictions that where a sentence has been partly executed, it may be revised and another in diminution or mitigation substituted for it during the term. The basis for the allowance of a diminution of punishment, while denying the court's power to increase it, is held to be in the fact that in the latter case accused would be subject to double punishment for the offense."

24 C. J. S. Criminal Law, Sec. 1588, p. 118.

The great principle of the common law forbidding repeated prosecutions for the same offense is of ancient origin. The common law rule against double jeopardy is also the rule in New Jersey being firmly embedded in our law.

State v. *Labato,* 7 N. J. 137, 80 A. 2d 617 (Sup. Ct., 1951);

State v. *Di Giosia,* 3 N. J. 413, 70 A. 2d 756 (Sup. Ct., 1950);

State v. *Mowser,* 92 N. J. L. 474, 106 A. 416 (E. & A., 1919);

State v. *Cooper,* 13 N. J. L. 361 (Sup. Ct., 1833).

In *Ex parte Lange,* 85 U. S. 163, 21 L. Ed. 872, 18 Wall. 163 (U. S. Sup. Ct., 1873) the punishment prescribed by the statute was imprisonment for not more than one year or a fine of not less than $10 nor more than $200; but Lange was sentenced to one year's imprisonment and to pay $200 fine. Five days after the imprisonment had begun, after payment of the fine and during the same term, Lange was brought before the same court on a writ of habeas corpus; an order was entered vacating the former judgment, and he was again sentenced to one year's imprisonment from that time. The Supreme Court stated the rule to be, page 167 of 18 Wall., 21 L. Ed. 872: "The general power of the court over its own judgments, orders, and decrees, in both civil and criminal cases, during the existence of the term at which they are first made, is undeniable." The court declared, however, that the power could not be so used as to violate the constitutional guarantee against double punishment, holding (page 173 of 18 Wall., 21 L. Ed. 872) that this guaranty applied to all cases where a second punishment is attempted to be inflicted for the same offense by a judicial sentence:

> "For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment

that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?

"The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it."

But the court immediately proceeded to say, page 174 of 18 Wall., 21 L. Ed. 872:

"If the court, for instance, had rendered a judgment for two years' imprisonment, it could no doubt, on its own motion, have vacated that judgment during the term and rendered a judgment for one year's imprisonment; or, if no part of the sentence had been executed, it could have rendered a judgment for two hundred dollars fine after vacating the first."

Then returning to the question of double punishment, and reciting that Lange had paid the fine and had undergone five days of the one year's imprisonment first imposed, the court said, page 175 of 18 Wall., 21 L. Ed. 872:

"• • • Can the court vacate that judgment entirely, and without reference to what has been done under it, impose another punishment on the prisoner on that same verdict? To do so is to punish him twice for the same offence. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing."

Conclusion.

It is manifest from the foregoing facts that the petitioner has been sentenced twice for the same offense and consequently has been twice placed in jeopardy of life or limb. This Honorable court, on the occasions when the question of double jeopardy in state matters has been considered, has only had occasion to answer that double jeopardy did not factually exist. The Fifth Amendment specifically provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. Does the Fourteenth Amendment afford the accused similar protection against state action? This question should be ruled upon by this Honorable court.

Wherefore, it is respectfully submitted that this Petition for a Writ of Certiorari to review the judgment of the Supreme Court of New Jersey should be granted.

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Appendix.

Statutes.

P. L. 1929, Chapter 156 (R. S. 2:199-1 *et seq.*).

R. S. 2:199-1. Power of courts to suspend sentence and place on probation; period of probation.

When it shall appear that the best interests of the public as well as of the defendant will be subserved thereby, the courts of this state having jurisdiction over criminal or quasi-criminal actions shall have power, after conviction or after a plea of guilty or *non vult* for any crime or offense, to suspend the imposition or execution of sentence, and also to place the defendant on probation under the supervision of the chief probation officer of the county, for a period of not less than one year nor more than five years.

The courts having jurisdiction over children's or domestic relations cases, when it shall appear that the best interests of the public as well as of the person adjudged guilty of any offense before such court will be subserved thereby, shall have power to place the defendant on probation for a period of not less than one year nor more than five years. Such courts shall also have power to place on probation under the same conditions children who shall come within the jurisdiction of the court.

If any person placed on probation shall abscond while under supervision, the time during which he remains away or hidden shall not be counted as part of his term of probation.

R. S. 2:199-2. Conditions of probation.

The court shall determine and may, at any time, modify the conditions of probation, and may, among others, include any of the following: That the probationer shall avoid injurious, immoral or vicious habits; shall avoid places or persons of disreputable or harmful character; shall report to the probation officer as directed by the court or probation officer; shall permit the probation officer to visit him at his

place or abode or elsewhere; shall answer all reasonable inquiries on the part of the probation officer; shall work faithfully at suitable employment; shall not change his residence without the consent of the court or probation officer; shall pay a fine or the costs of the prosecution, or both, in one or several sums; shall make reparation or restitution to the aggrieved parties for the damage or loss caused by his offense; shall support his dependents.

R. S. 2:199-4. Termination or extension of probation; violation of conditions; arrest and detention; sentence.

Upon a report from the chief probation officer that the probationer has complied with the conditions of probation and that the best interests of the public and the probationer will be subserved thereby or for other good cause, the court, may, at any time, discharge a person from probation, or may extend the probation period within the limits of the maximum period provided by section 2:199-1 of this title.

At any time during the probation period the court may issue a warrant and cause the probationer to be arrested for violating any of the conditions of his probation, or any probation officer, police officer, or other officer with power of arrest, upon the request of the chief probation officer, may arrest the probationer without a warrant; and a commitment by such probation officer setting forth that the probationer has, in his judgment, violated the conditions of his probation shall be sufficient warrant for the detention of such probationer in the county jail, house of detention or local prison, when designated in the commitment, until he can be brought before the court. Such probation officer shall forthwith report such arrest or detention to the court and submit to the court a report showing the manner in which the probationer has violated his probation. Thereupon the court, after summary hearing, may continue or it may revoke the probation and the suspension of sentence, and may cause the sentence imposed to be executed or impose any sentence which might originally have been imposed.

R. S. 2:103-6. Misdemeanors; punishment.

Any person found guilty of any crime which by any statute is declared to be a misdemeanor, and for which no punishment is specifically provided, shall be punished by a fine not exceeding one thousand dollars, or by imprisonment, with or without hard labor, as the court may direct, for a term not exceeding three years, or both.